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MONTANA PROSECUTOR

December, 1977 Volume 1, No. 8

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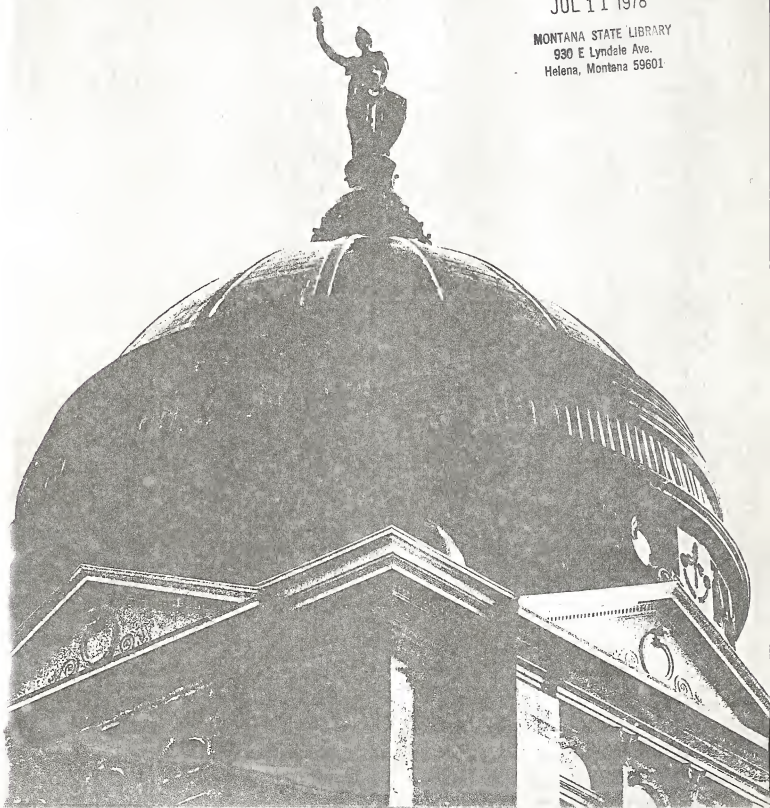

INTRODUCTORY NOTES

The Technical Assistance Program, designed to provide on-site management assistance to prosecutor offices, has been re-funded by LEAA and implemented by the National District Attorney's Association. Offices interested in securing this assistance should contact James R. Heelan, Director, Management, Evaluation and Contracts, NDAA, 211 East Chicago Avenue, Suite 1515, Chicago, Illinois, 60611, (312) 944-2577.

Included within this issue is a schedule of out-of-state training seminars. The schedule includes conferences scheduled by the National College of District Attorneys, the National District Attorney's Association and state organizations. To apply to go to one of these conferences write to the Office of County Prosecutor Services.

A mid-winter training conference and business meeting for the MCAA has been proposed by several members of the Association to be held at Big Sky near Bozeman. Tentative suggestions have included a proposal to have a CLE and SKI format with instruction offered in the morning and afternoons free. Your comments are solicited.

There are two corrections to be made to the list of expert witnesses published in Volume 1, No. 6, October, 1977, issue of the Montana Prosecutor. On page 24 the telephone number of "The Experts" should be (312) 492-3270 rather than (312) 492-5476. On page 27 the phone number for Dr. John P. Pfaff should be 727-3333. Previously no phone number was listed.

Also included within this issue are references to Eyewitness Identification and Exclusion of Witnesses. If anybody has any writings similar to these references that may be of interest to all prosecutors, don't hesitate to send them to the Office of County Prosecutor Services.

QUOTES FOR PROSECUTORS

"America has no idea whether capital punishment works or not -- it's never tried." H.L.Mencken

"Lo! Christ himself chose only twelve. Yet, one of these turned out a thief." Cincinnatus Heine

RECENT CASES

HEARSAY - EXCITED UTTERANCE

Statements of rape to cousin at apartment then later to policemen while prosecutrix was still visibly upset, nervous and crying properly admitted as excited utterances. Time is not sole test for admission, court cites state supreme court case where one and one half hours was not too long, less time was involved here. State v. Perry, 567 P.2d 786.

SEARCH AND SEIZURE

Reasonable suspicion requires some out of the ordinary activity, some reason to connect the person detained with the activity, and some indication that the activity is criminal. There was reasonable suspicion authorizing an investigatory stop where several people told the officer the defendant was dealing in drugs, and the officer observed defendant and others smoking in the communal manner characteristic of a group of people smoking marijuana. State v. Lelevier (Ariz.) 567 P.2d 783.

BURGLARY

Evidence that a house has recently been burglarized plus unexplained possession of fruits of burglary is sufficient evidence to convict for burglary. Thus, evidence that defendant possessed six of eight items stolen in burglary seven months after burglary was sufficient to support conviction. Hardage v. State (Tex.Cr.App.) 552 S.W.2d 837.

DRUGS AND NARCOTICS

Deputies had probable cause to believe crime was being committed in their presence and to arrest defendant without warrant since they had received information and observed defendant cultivating a marijuana crop. Quarles v. State (Ga.App.) 236 S.E.2d 139.

GRAND JURY

A grand jury subpoena directing the defendant to appear and furnish identifying exemplars, such as fingerprints, handwriting and photographs is proper, and violation of the order constitutes grounds for holding defendant in contempt. In re Grand Jury Proceedings, (5th Cir.) 558 F.2d 1177.

OTHER CRIMES

Evidence that defendant raped victim's lover immediately after fatally stabbing victim was admissible as it provided possible motive. State v. Gibson (Utah) 565 P.2d 783.

VALUE PROPERTY

Evidence that value of stolen property was at least $150 and replacement value was even higher was sufficient to convict for felony of receipt of stolen property, even though value was not given in terms of "fair market cash value". People v. Cobetto (Ill.) 363 N.E.2d 854.

PROBATION REVOCATION

Testimony by defendant's probation officer that the defendant did not have permission to leave Tucson rehabilitation program, and that the officer had received a letter and phone call stating defendant had left was sufficient to revoke probation, since a probation revocation may be based solely on hearsay. (Court couldn't take defendant too seriously, he was brought back to Tucson on a bench warrant.) State v. Valenzuela (Ariz.) 567 P.2d 1190.

AID AND ABET

Defendant who accompanied robber and yelled "cut him, cut him" just prior to the robber cutting the victim was subject to the enhanced punishment section for using a knife as a aider and abettor, whether or not he personally wielded the weapon that inflicted the injury. People v. Mills (Cal.App.) 140 Cal.Rptr. 803

ARGUMENT

Since neither robbery nor aggravated assault were specific intent crimes, intoxication is no defense to the charge. Thus argument that anyone could come in and say they didn't know what they were doing, please let them go did not prejudice the defendant. State v. Cunningham (Kan.) 567 P.2d 879.

ARREST

Even where defendant reasonably believed that he was under arrest, such belief of defendant cannot be legally sufficient to establish an arrest of defendant before police officer in fact acts in manner constituting the assertion of control over defendant. Likewise, the subjective intention of police officer to assert custodial control absent some objective manifestation of effectuating the intent, is not per se determinative of the issue. State v. Kelly (Me.) 376 A.2d 84

BRUTON

Admission of crucial hearsay statements of an absent co-conspirator that implicated codefendants was proper and did not violate the co-defendants right of confrontation. United States v. Martines (5th Cir.) 555 F.2d 1248

MIRANDA

Where, after defendant was advised of his Miranda rights and asked if he would answer some questions and he said, "It all depends", then answered only questions he wished and later indicated he would answer no more questions, taped conversation was properly admitted because tape was of statements voluntarily made. State v. Nelson (Minn.) 257 N.W.2d 356.

DOUBLE JEOPARDY

Dismissal of felony charges against defendant, after full presentation of evidence against defendant at preliminary hearing where court had jurisdiction to convict of lesser included offense, did not constitute adjudication which barred further prosecution. Moore v. Commonwealth (Va.) 237 S.E.2d 187.

ESCAPE

Fact that defendant never reported to proper authorities during two years of his freedom following his escape from penitentiary made court's refusal to instruct on duress proper. United States v. Michelson (9th Cir.) 559 F.2d 567.

HEARSAY

Detective's testimony that certain witnesses' out-of-court statements made to detective were not the same as their testimony at trial was not hearsay because detective's testimony was not being offered as an assertion to show the truth of the matter contained in the other witnesses' statement. Faust v. State (Ind.) 366 N.E.2d 175.

IDENTIFICATION

Fact that in a six picture show-up three photos were of blacks significantly younger than defendant, only defendant and two others had afros, and only the picture of defendant showed a beard did not render the lineup impermissibly suggestive. United State v. Collins (9th Cir.) 559 F.2d 561.

REASONABLE SUSPICION

Where patrolling officer observed young people parked in auto, and where one appeared to be in a stupor, court properly found a reasonable suspicion justifying limited intrusion of requesting driver to open the window of the car, which resulted in officer smelling odor of marijuana and arresting and searching driver and auto. State v. Hodgman (Minn.) 257 N.W.2d 313.

SPEEDY TRIAL

Where defendant was present at the time that trial was set and did not object to fact that it was being set beyond the six month period mandated by the speedy trial rule, defendant waived rights guaranteed by the rule. Smith v. State (Ind.) 366 N.E.2d 170.

SEARCH AND SEIZURE

Where police searched trunk of third party and inadvertantly discovered pipe bomb of defendant, defendant had no standing to object because he had no privacy interest in the auto. Bomb was "contraband" which police were justified in seizing, and because initial opening of trunk was not directed at defendant, seizure based on plain view proper. United States v. Lisk (7th Cir.) 559 F.2d 1108.

Since the information was furnished by an eye witness rather than by informer, there was no need to show that party providing information was credible. Foley v. State (Miss.) 348 So.2d 1034.

VOLUNTARINESS OF STATEMENT

Where husband and wife were both arrested, wife's first confession was not inadmissible because elicited by playing husband's taped confession obtained in violation of Miranda and second confession voluntarily made was not inadmissible as tainted product of the first, since wife had no standing to suppress confessions made by her by asserting violation of husband's Fifth Amendment rights. Court also rules permissible police practice of confronting a suspect with a confession of an accomplice - confession which may be actual or just alleged by police. People v. Felix (Cal.App.) 139 Cal.Rptr. 366.

ADMISSION OF GRUESOME PHOTOGRAPHS NOT PREJUDICIAL ERROR

Photographs of a homicide victim, although gruesome, may be admitted into evidence if they portray or explain the condition of the victim's body, the nature and extent of wounds, the mechanism of death, or if they assist in establishing malice or intent. State v. Partee, 199 Neb. 305 (1977).

AMOUNT OF RESTITUTION MAY BE DETERMINED AT LATER DATE

When the trial court pronounces sentence, it may reserve for later determination the fixing of the amount of restitution which a defendant may be required to make. State v. Betts, 199 Neb. 277 (1977.)

MISTAKE NOT A DEFENSE TO RECEIVING STOLEN PROPERTY

The Colorado Supreme Court has concluded that under that state's new theft provisions, a person may be criminally liable for receiving property that he mistakenly believed was stolen. People v. Holloway, 22 Cr. L. 2017 (1977).

OFFICER'S FRIENDLY SUGGESTION TO TELL THE TRUTH IS NOT CONSIDERED INTERROGATION

When a police officer presents to a suspect the suggestion that he tell the truth like a man, does this amount to interrogation for which Miranda warnings are required? Not so says the Virginia Supreme Court In Owens v. Commonwealth, 21 Cr.L. 2296 (1977).

IMPOSITION OF CONSECUTIVE SENTENCES DID NOT VIOLATE DOUBLE JEOPARDY

The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, which arise out of the same transaction, is whether the offense charged in one count involves any different elements than an offense charged in another court. State v. Hardin, 199 Neb. 314 (1977). The statute in Montana, section 95-1711, R.C.M. 1947 should be consulted in this situation.

CONSPIRACY

Conviction for conspiracy upheld where another co-conspirator satisfied the overt act requirement by driving a camper with marijuana to meet informant and defendants at a hotel. The informant's information, the meeting and defendant's driving a lookout car were sufficient evidence to find a conspiracy. State v. Dupuy (Ariz.) 568 P.2d 1049.

CORPUS DELECTI

The testimony of an accomplice may establish the corpus delecti, and it need not be corroborated. Where the corpus delecti is eventually established defendant is not prejudiced if his statements are admitted before it is established. State v. Gambrell 568 P.2d 1086.

DISCOVERY

Proper to use witnesses listed for the case-in-chief as rebuttal witnesses. Unnecessary to disclose all police reports of incidents and rap sheets of persons involved in disturbances at a particular location, the request was "purest speculation". State v. Hatton (Ariz.) 568 P.2d 1040.

Typing "D.P.S. chemist" on the information and putting his report into evidence at the preliminary hearing was sufficient notice to the defense attorney so that the court didn't abuse its authority when it refused to bar the witness. State v. Dupuy (Ariz.) 568 P.2d 1049.

DRUGS AND NARCOTICS

The facts that defendant paid part of the rent and the lease was in his name, his papers were found in the same room as baggies and a brick, only his bedroom had a bed while marijuana was throughout the rest of the house were sufficient to show constructive possession. State v. Donovan 568 P.2d 1107.

EVIDENCE

Burned portion of jacket, very similar to victim's, located by a second search near place where defendant had been, was properly admitted. Conclusiveness of identification goes to the weight, not the admissibility of the evidence. State v. Hatton (Ariz.) 568 P.2d 1040.

INSUFFICIENT FUNDS CHECKS

Drawing a check on a bank where the defendant does not have an account necessarily implies that there are insufficient funds to cover the check. Language from an earlier case that the crimes were not included offenses of the other is called dictum, court upholds insufficient funds conviction where checks were no account. State v. Murphy 568 P.2d 428

INTOXICATION - MANSLAUGHTER

Proper to refuse to give a manslaughter instruction in prosecution for first degree murder where there was evidence defendant was intoxicated. Evidence of intoxication may not be considered to determine whether defendant could form the specific intent to kill. State v. Doss (Ariz.) 568 P.2d 1054.

MANSLAUGHTER

Proper to refuse to give a manslaughter instruction where provocation was mere words, and defendant had time to cool off since he had to drive home to get his gun. State v. Doss (Ariz.) 568 P.2d 1054.

MIRANDA

Test for custodial interrogation, which required Miranda, is whether a reasonable person would feel deprived of his freedom of action in any significant way. The fact that defendant was a suspect or that the investigation had focused on him does not be itself establish custodial interrogation. No warnings were necessary here since the officer told defendant he was free to come and go, but would be tailed, and the friendly interrogation took place in defendant's home. State v. Hatton (Ariz.) 568 P.2d 1040.

PLEA AGREEMENT

Recommendation of a lengthy sentence by the investigating officer did not violate a no recommendation plea agreement since police are not parties to the plea agreement and the issue was waived by appellant's failure to object. State v. Rogel (Ariz.) 568 P.2d 421.

PROBATION CONDITIONS

Probation conditions that defendant live with his parents, be in by 10:00 P.M., continue his education or get a job and not associate with his girlfriend were valid. State v. Donovan 568 P.2d 1107.

SENTENCE

Trial court has jurisdiction to modify date sentence commences when defendant remains at large after the date the sentence was originally scheduled to commence. State v. Quiroz 568 P.2d 1090.

SEARCH AND SEIZURE

Telling defendant that if he didn't open the door the officers would kick it in made opening of door involuntary. Even if the defendant did consent to the subsequent search of the room after he was given Miranda, it was vitiated by the threat and by the officers showing an unsigned warrant and saying they could get it signed. State v. McMahon (Ariz.) 568 P.2d 1027.

Officers invited to premises to keep peace by a co-resident were lawfully on the premises and their observation of narcotics paraphernalia properly constituted probable cause for a telephonic search warrant. State v. Donovan, 568 P.2d 1107.

SEARCH WARRANT - ARREST

Even if there is a right to resist an unlawful arrest, there is no right to resist an unlawful search warrant so appellant was properly arrested for obstructing justice when he resisted a search warrant. State v. Hatton (Ariz.) 568 P.2d 1040.

FYEWITNESS IDENTIFICATION

In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court held that an in-court identification by a witness who identified the accused in the absence of appointed counsel at a post-charge lineup must be excluded unless it could be established that such evidence was not tainted by the pretrial identification. In Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court held that testimony by an eyewitness concerning a pretrial identification conducted without counsel would be inadmissible. After the Wade and Gilbert decisions the Supreme Court decided Kirby v. Illinois, 406 U.S. 682 (1972). The plurality opinion in Kirby indicated that an accused is entitled to counsel at a confrontation for identification, whether a lineup or a showup when the "initation of judicial proceedings" takes place. So, the accused is not entitled to counsel at a confrontation for identification prior to formal charge, preliminary hearing, indictment or arraignmtnt.

Another ground for challenging evidence of a pretrial identification, even where counsel is not required, is to show that the identification resulted in a denial of due process because it was unnecessarily suggestive and conducive to irreparable mistaken identification. In determining whether an in-court identification may be made where there has been an allegation of a denial of due process, a two-step procedure should be followed. First, the judge should determine at an out-of-court session whether the particular pretrial identification was impermissibly suggestive. If the judge makes such a determination, he should then determine whether the impermissibly suggestive pretrial identification gives rise to a very substantial liklihood of mistaken identification. If both of these elements are found, the use of the in-court identification is prohibited. (U.S. v. Evans, 484 F.2d 11782d Cir. 1973); U.S. v. Gambrill, 449 F.2d 1148 D.C. Cir. 1971; U.S. v. Sutherland, 428 F.2d 1152 5th Cir. 1970.)

Where the judge finds that the pretrial identification was impermissibly suggestive, but would not lead to a liklihood of irreparable mistaken identification, he may allow an in-court identification provided the prosecution can show by clear and convincing evidence that the in-court identification has an independent basis and is not the result of the improper identification. Neil v. Biggers, 409 U.S. 188 (1972). Factors to be considered in deciding whether an independent basis exists are: (1) the opportunity of the witness to view the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator of the offense, (4) the level of certainty demonstrated by the witness at the in-court identification, and (5) the length of time between the crime and the pretrial identification.

Once it has been determined that the accused had the right to counsel at a pretrial identification, the prosecution must as a predicate to an in-court identification of the accused clearly establish that the in-court identification had an independent basis free of any exploitation of the primary taint stemming from the defective identification.

Among the factors to be considered in determining whether an in-court identification of the accused is sufficiently distinguishable to be purged of the tainted pretrial confrontation are (1) prior opportunity of the witnesses to observe the criminal act, (2) existence of a discrepancy between any prelineup description and the actual appearance of the accused, (3) any identification of another person prior to the lineup, (4) failure to identify the accused on a prior occasion, (5) lapse of time between the criminal act and the lineup identification, (6) prior photographic identification from a large group of photographs, (7) circumstances surrounding the conduct of the lineup, (8) the exercise of unusual care to make observations, (9) prompt identification at the first confrontation, (10) fairness of the lineup, (11) the presence of distinctive physical characteristics in defendant, (12) positiveness of witness about independant basis, (13) prior acquaintance of witness with defendant, and (14) ability and training in identification.

Relevant Montana cases on the subject are State v. Borchert, 156 Mont. 315, 479 P.2d 454 (1970) and State v. Bouldin, 456 P.2d 830 (1969).

EXCLUSION OF WITNESSES

The rule of evidence regarding exclusion of witnesses from the courtroom in civil cases has been made applicable to criminal cases. State v. McLeod, 131 Mont. 478, 311 P.2d 400.

And the application for exclusion of witnesses is to be ruled upon in the sound legal discretion of the trial court. In the absence of any showing of prejudice, the action of the trial court will not be disturbed. Finlan vs. Heinze, 32 Mont. 354, 383, 80 P 918; Smith v. Armstrong, 121 Mont. 377, 198 P.2d 795; 23 CJS Criminal Law, Section 1011, p.1080.

Applications for exemption of witnesses from the operation of the rule or order for exclusion or sequestration of witnesses is also within the discretion of the trial court. Using their discretion, trial courts throughout the United States have applied the exemption to various classes of witnesses, including attorneys, public officers, prosecuting witnesses, and expert witnesses.

It has been held that the exemption of particular classes of witnesses from the operation of the rule or the order of exclusion does not constitute an abuse of discretion. State vs. Walsh, 72 Mont. 110 232 P 194. 23 CJS, Criminal Law, Section 1011, page 1080, and cases footnoted thereunder.

In State vs. Walsh, supra, the Montana Supreme Court upheld the exemption of two sheriff officers who remained in the courtroom for purposes of assisting the county attorney in the prosecution of the case. In ruling that such an exemption is entirely within the discretion of the trial court, the Montana Supreme Court quotes Corpus Juris as saying "persons whom the court usually exempts from the operation of the rule are attorneys of the court; court officers who happen to be witnesses, and whose attendance in the courtroom is necessary; a detective or officer assisting in the preparing of the case for prosecution", State v. Walsh, supra, at 118. Following the statement of law contained in Walsh, the Montana Supreme Court has upheld allowing police officers to remain in the courtroom for purposes of advising the prosecuting attorney. State vs. Fitzpatrick, 149 Mont. 400, 427 P.2d 300 (1967). And, focusing on what would be an abuse of discretion in exempting witnesses from the exclusionary rule, the Montana Supreme Court held that an exemption of 25 witnesses was not an abuse of discretion because no prejudice to the defendant was shown. State v. McLeod, 131 Mont. 478, 311 P.2d 400.

A variety of jurisdictions outside Montana have allowed various classes of witnesses to be exempt from the operation of the rule or order for exclusion or sequestration of witnesses. State vs. Salyer, 72 N.E. 2d 293; Agent vs. State, 118 Oklahoma CR. 281, 194 Pac. 233; Wells vs. State, 153 Texas CR. 331, 220 S.W.2d 148;

Oakes vs. State, 135 Arkansas 221, 205 SW 305; Gillespie v. State, 215 Miss. 380, 161 So.2d 150; Rhamy vs. State, 307 P2d 555; Asher vs. State, 102 Texas CR. 162, 277 S.W. 1099.

OUT-OF-STATE SEMINARS

Jan. 1978	
3 - 6	Appellate Advocacy, Houston, Texas
15 - 20	NCDA Prosecutor's Office Administrator Course, Houston, Texas
29 - 31	LDAA Child Support Enforcement Conference, Baton Rouge, Louisiana
29 - Feb. 1	NCDA Major Fraud, San Diego, California
29 - Feb. 2	NDAA 5th National Conference on Juvenile Justice, San Francisco
Feb.	
8 - 11	LDAA Second Annual Southeast Regional Narcotics Seminar - New Orleans, Louisiana
12 - 15	NCDA Pretrial Problems Seminar - Denver Colorado
26 - Mar. 2	NCDA Organized Crime, Indianapolis, Indiana
	NDAA Mid-Winter Conference, San Francisco, California
March	
5 - 9	NDAA 5th National Conference of Juvenile Justice, Baton Rouge, Louisiana
12 - 17	NCDA Investigators School, Location to be announced
14 - 18	NCDA Trial Techniques, Los Angeles, California
April	
9 - 12	NCDA Crimes Against Persons, Orland, Florida
23 - 28	NCDA Advanced Organized Crime, Dallas, Texas
May	
21- 26	NCDA Prosecutor's Office Administrator Course, Part I, Houston, Texas
June	
12 - 23	NCDA Executive PRosecutor Course, Houston, Texas
July	
5 - 8	ODAA Summer Conference, Sunriver, Oregon
9 - 14	NDAA Mid-Summer Conference, Hershey, PA
9 - 28	NCDA Career Prosecutor Course, Houston, Texas

Feb. 1979	
25 - Mar. 2	NDAA Mid-Winter Conference, Biloxi, MS
July	
29 - Aug. 3	NDAA Mid-Summer Conference, Mackinac Island, MI
March 1980	NDAA Mid-Winter Conference, Hawaii
July	
29 - Aug. 2	NDAA Mid-Summer Conference, Sun Valley, Idaho
March 1981	
1 - 6	NDAA Mid-Winter Conference, Phoenix, Arizona
July	NDAA Mid-Summer Conference, Snowmass, CO